STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH KIND,

Plaintiff-Appellant,

v

SCOTT GIES and KUPELIAN ORMOND & MAGY, PC,

Defendants-Appellees.

UNPUBLISHED
November 8, 2011

No. 299825
Oakland Circuit Court
LC No. 2009-105877-NM

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant Scott Gies and his law firm represented plaintiff Deborah Kind in her Chapter 7 Bankruptcy proceeding, during which Kind lost her salon business to her primary creditor. Kind filed this legal malpractice action alleging that Gies gave her inaccurate and unsound advice resulting in the loss of her assets. The trial court summarily dismissed Kind's complaint for failure to state a claim, concluding that Gies's letters, which were attached to the complaint, contradicted the facts cited by Kind in support of her malpractice claim. Because the letters were not part of the complaint and did not actually contradict the facts supporting Kind's theory of malpractice, we vacate the trial court's order and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kind filed for Chapter 7 Bankruptcy in 2005 in the hopes of restructuring her debt and keeping the necessary assets to maintain her livelihood. Over a year later, Kind hired Gies to represent her interests. Kind filed this legal malpractice claim on December 1, 2009. Kind alleged that she informed Gies that she "wanted to retain from the property of the estate as many of the salon assets as possible so she could continue her business." In response, Gies informed Kind by letter:

> The only way to prevent the Trustee from [liquidating the assets] is to work with Mark [LeChard] and the amount of funds owed to him. In order to save the salon, the deal with Mark [LeChard] would have to be outside of the bankruptcy proceedings. He would have to agree to defer and/or accept payments from you outside the bankruptcy. . . . By doing this, the Trustee would be in a position to pay all creditors a 100% dividend. She would also be in a position to pay herself and her counsel in full. By doing this, the Trustee would not have to liquidate any

> more of assets . . . as all claims in the bankruptcy proceeding would have been satisfied.

Either Kind did not want to negotiate with LeChard or the negotiations failed. Gies subsequently received the Trustee's notice of sale for the real estate, along with a purchase agreement between the Trustee and LeChard for $6,000. Kind alleged that Gies reviewed the notice of sale and purchase agreement and verbally advised her not to object to the sale or enter a competing bid. Gies's advice was premised on the idea that LeChard's payment of $6,000 "resulted in a corresponding payment obligation 'by Purchaser of all amounts necessary to discharge all liens and encumbrances against the Property, and the payment of all real estate taxes due and owing against the property.'" Kind further alleged that Gies advised her that this provision of the purchase agreement "would result in the bankruptcy estate becoming solvent and the creditors of the bankruptcy estate being paid in full, including the Trustee and her attorney." And, as a result of the creditors being paid in full, the Trustee would no longer need to liquidate the salon assets. Kind asserted that she relied on this advice and did not object to the sale of the real estate or file a competing bid.

Kind alleged that Gies's legal advice was faulty because he "was seemingly unaware of or misconstrued the legal effect of" the purchase agreement's provision retaining LeChard's "right to file a claim [against the bankruptcy estate] in the unsecured amount of . . . $250,000." Indeed, Gies did not mention this provision of the purchase agreement in his written communications. At a November 20, 2007 bankruptcy court hearing, Gies indicated his belief that "all the liens are going to get paid. That's what my client and I looked at. All liens are going to get paid, we're—we're happy, all liens are going to get paid." The bankruptcy court subsequently allowed LeChard to file a $250,000 claim against the bankruptcy estate as provided in the purchase agreement. As a result of LeChard's unsecured claim, the bankruptcy estate was insolvent and the creditors were not paid in full. Accordingly, the Trustee liquidated the salon's assets and LeChard was able to purchase them for $90,000. The Trustee then successfully petitioned the court to deny Kind a Chapter 7 discharge of her debts and Kind remains personally liable for LeChard's $250,000 claim. Kind alleged that she did not seriously consider any settlement scenarios that Gies presented to her because Gies had previously suggested a course of action that directly achieved her desired goals.

Gies denied the allegations in Kind's complaint and, on March 3, 2010, filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Gies argued that the substance of the attached letters contradicted the allegations in the complaint regarding the nature of the advice he provided. Kind did not respond and the trial court granted Gies's motion on May 18, 2010, noting that Gies could not be held "liable as guarantor[] of a specific outcome." Kind filed a motion for rehearing or relief from judgment, arguing that the parties had exchanged interrogatories, document requests and witness lists since Gies filed his motion. Kind also argued that her complaint included many allegations outside of the two attached letters, all of which combined to form her malpractice claim. In the alternative, Kind contended that the letters were not "written instruments" that could be considered "part of the pleading" under the court rules. The trial court rejected Kind's arguments stating:

> The Court finds that Plaintiff has failed to state a claim upon which relief may be granted because the documents attached to the Complaint establish as a matter of

law that Defendants were not professionally negligent in their representation of Plaintiff. Under Michigan law, the letters that were attached to the Complaint and form the basis of the Complaint may be considered as part of the pleading. The letters from Defendants inform and advise Plaintiff of her options regarding the salon assets during the Bankruptcy proceedings. The letters clearly demonstrate that Plaintiff was provided with the legal advice that the Complaint alleges she did not receive.

II. STANDARD OF REVIEW FOR (C)(8) MOTION

We review de novo a trial court's ruling on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Summary disposition is appropriate under MCR 2.116(C)(8) when "[t]he opposing party has failed to state a valid claim on which relief can be granted." A (C)(8) motion tests the legal sufficiency of a plaintiff's claim on the "pleadings" alone. MCR 2.116(G)(5); *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). See also *Feyz*, 475 Mich at 672 (noting that a [C][8] motion "tests the legal sufficiency of the complaint on the allegations of the pleadings alone"). Summary disposition under this subrule is appropriate "where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). See also *Beaudrie*, 465 Mich at 129-130.

When reviewing the pleadings in connection with a (C)(8) motion, the court must accept "all well-pleaded allegations" of fact as true and in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 119; *Wade*, 439 Mich at 162-163. Stated differently, "'[a]ll factual allegations supporting the claim, and any reasonable inference[s] or conclusions that can be drawn from the facts, are accepted as true.'" *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

The trial court based its judgment not only on the allegations listed in the complaint, but also on the contents of letters from Gies, which Kind, then proceeding *in propria persona*, attached to her pleading. Generally, a party seeking dismissal under MCR 2.116(C)(8) may not support or challenge a pleading "with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010). Here, the court incorrectly treated the attached letters as part of the "pleading," which could be considered in a (C)(8) motion. To resolve this issue, we must consider the meaning of various court rules. When interpreting a court rule, we apply "the same principles that govern the interpretation of statutes." *Ligons v Crittendon Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). Our goal "is to give effect to the plain meaning of the text." *Id.*

A "pleading" is defined by court rule to include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of the preceding documents and replies to answers. MCR 2.110(A). As recently noted by our Supreme Court in *Ligons*, 490 Mich at 81-82:

> As with statutes, when a court rule "specifically defines a given term, that definition alone controls." An [affidavit of merit], even if required to be appended to a complaint, is not included in this restrictive definition of a "pleading." . . . Under MCR 2.110(A)(1), for purposes of the court rules it is the "complaint" itself that constitutes a "pleading," not the complaint and any document accompanying it. [Internal citation omitted.]

The term "complaint," however, is not defined by court rule. As such we turn to the dictionary to define this term. *Krohn v Home-Owners Ins, Inc*, 490 Mich 145, 156; 802 NW2d 281 (2011). A "complaint" is defined as "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief." *Black's Law Dictionary* (8th ed). "A complaint must contain a statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims." *Dalley*, 287 Mich App at 305.

Gies's letters did not state "the basis for the plaintiff's claim." Rather, the basis for Kind's claim was the allegedly negligent legal advice provided by Gies. The letters were not the only source of that advice. At most, the letters memorialized a portion of the alleged advice. As such, the trial court improperly treated the letters as part of the pleading. See *Decker v Flood*, 248 Mich App 75, 80 n 4; 638 NW2d 163 (2001) (affidavit attached to plaintiffs' complaint "does not meet the definition of a 'pleading' under the court rules").

However, certain exhibits are considered to be part of the complaint by operation of court rule. MCR 2.113(F) mandates the attachment of certain "written instruments" to a pleading and specifically incorporates those "written instruments" as part of the pleading:

> (1) If a claim or defense is based on a *written instrument*, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit unless the instrument is
>
> (a) a matter of public record in the county in which the action is commenced and its location in the record is stated in the pleading;
>
> (b) in the possession of the adverse party and the pleading so states;
>
> (c) inaccessible to the pleader and the pleading so states, giving the reason; or
>
> (d) of a nature that attaching the instrument would be unnecessary or impractical and the pleading so states, giving the reason.
>
> (2) An exhibit attached or referred to under subrule (F)(1)(a) or (b) *is a part of the pleading for all purposes*. [Emphasis added.]

Once attached as part of the pleading, the instrument becomes part of that pleading "even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apartments v Roumayah*, 274 Mich App 622, 635; 736 NW2d 284 (2007).

The term "written instrument" is not defined in the court rule. In general, an "instrument" is "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate." *Black's Law Dictionary* (8th ed). See also *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 621; 552 NW2d 657 (1996) (defining "'written instrument' as 'something reduced to writing as a means of evidence, as the means of giving formal expression to some act or contract'" and an "instrument" as "'a formal legal document as a contract, deed or grant'"). Over the years, Michigan courts have narrowed the parameters of this definition by inclusion and exclusion. *Equitable Trust Co v Fisher*, 301 Mich 66, 74; 3 NW2d 13 (1942) (the plaintiff was not seeking relief under the defendant's "acknowledgement of liability," so that document was not part of the pleading); *Dalley*, 287 Mich App at 301 n 1 (a federal court temporary restraining order was part of the complaint because that pleading referenced the order and the order was "a matter of public record"); *Laurel Woods*, 274 Mich App at 637 (written lease agreement was part of the complaint); *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003) (in an action based on a contract, that contract is considered part of the complaint); *Karam v Law Offices of Ralph J Kliber*, 253 Mich App 410, 418 n 6; 655 NW2d 614 (2002) (trust documents underlying malpractice claim were part of the complaint); *Slate v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 427-428; 648 NW2d 205 (2002) (memorandum of agreement was part of complaint); *Decker*, 248 Mich App at 80 n 4 (an affidavit of merit in a medical malpractice action is not a part of the pleading even when attached to the complaint).

The types of documents that have been deemed "written instruments" for the purpose of pleading requirements all "define[] rights, duties, entitlements, or liabilities" of the parties. They include instruments akin to contracts, showing an agreement to be bound, or court orders that must be enforced. This distinction between the types of documents that are and are not deemed part of the pleading is supported by the Michigan Supreme Court's amendment of the pleading rules several decades ago. Michigan Court Rule 17 (1933) provided, "Whenever a cause of action or defense is based upon a written instrument *or document*, . . . a copy thereof shall be attached to the pleading as an exhibit, which shall be deemed to be a part of the pleading . . . ." (Emphasis added). In drafting MCR 2.113(F), and the intervening GCR 1963, 113.4, the Michigan Supreme Court eliminated the term "document." Through this amendment to the court rule language, the Supreme Court signaled its intent to either change or clarify the meaning of the rule. *Ewing v Detroit*, 237 Mich App 696, 703; 604 NW2d 787 (1999). Either way, the Court indicated its intent to narrow the category of exhibits that are treated as part of a pleading. When a letter does not define any "rights, duties, entitlements, or liabilities" flowing from one party to the other, it may be a "document." However, that letter would not be a "written instrument" that could be considered part and parcel with the complaint.

Here, the letters from Gies include advice from an attorney to his client regarding the circumstances of her bankruptcy action. The letters do not include an agreement or contract for services. As such, these letters bear no resemblance to a "written instrument" contemplated by MCR 2.113(F). And the letters do not form the basis of Kind's complaint. Therefore, the letters are not a "pleading" under MCR 2.110(A). The trial court erred in considering the letters along with the complaint in deciding Gies's motion for summary disposition under MCR 2.116(C)(8).

III. SUMMARY DISPOSITION UNDER (C)(8) UNWARRANTED

Kind did state a claim upon which relief could be granted in her complaint. To establish a legal malpractice claim, a plaintiff must prove "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Gies challenged only the negligence element of Kind's claim. Negligence occurs when the attorney violates his duty "to use reasonable skill, care, discretion and judgment in representing a client." *Id.* at 656. An attorney, however, does not "have a duty to insure or guarantee the most favorable outcome possible" and "is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Id.*

In her complaint, Kind enumerated several breaches of the duty of care that, considered as true and in the light most favorable to Kind, support her malpractice claim. Kind alleged that she informed Gies of her desire "to retain from the property of the estate as many of the salon assets as possible so she could continue her business." On April 11, 2007, Gies informed Kind in writing that she could avoid the liquidation of her assets by negotiating her payments with LeChard outside of the bankruptcy proceedings. Gies then made the following written assurance:

> By doing this, the Trustee would be in a position to pay all creditors a 100% dividend. She would also be in a position to pay herself and her counsel in full. By doing this, the Trustee would not have to liquidate any more of assets [sic] . . . as all claims in the bankruptcy estate would have been satisfied.

Kind asserts that Gies advised her, we presume orally, "that she should not object to the sale set forth in the Purchase Agreement or file her own competing bid for the Property as called for in the Notice of Sale." Gies, relying on the purchase agreement's provision that the payment obligation was subject to "all amounts necessary to discharge all liens and encumbrances against the Property, and the payment of all real estate taxes due and owing against the Property," advised Kind that this sale "would result in the bankruptcy estate becoming solvent and the creditors of the bankruptcy estate being paid in full." Kind averred that Gies advised her that, following the sale, the salon assets would not be liquidated and would be returned to her. Kind alleged that Gies was "seemingly unaware of or misconstrued the legal effect of" the purchase agreement's statement that LeChard "does not waive the right to file a claim in the [bankruptcy court] in the unsecured amount of [$250,000]." Kind admitted that "[f]rom time-to-time Defendant Gies discussed possible ways to settle the issues in dispute with both LeChard and the Trustee, but, based on Defendant Gies's advice set forth above, Plaintiff Kind did not seriously consider these settlement scenarios." Ultimately, Kind accused Gies of failing to adequately review the notice of sale and purchase agreement resulting in the provision of legally inaccurate and unsound advice.

These allegations, accepted as true and construed in the light most favorable to Kind, would support a claim for legal malpractice. The allegations tend to establish that Gies did not adequately review LeChard's purchase agreement for the real estate. If Gies had properly reviewed that document, he would have advised Kind that LeChard could file a significant

unsecured claim against the bankruptcy estate and foil Kind's plans. Accordingly, the trial court erred in granting Gies's motion for dismissal under MCR 2.116(C)(8).

As noted, Kind's malpractice action is not based upon the letters from Gies. Rather, the letters memorialize a portion of the advice given by Gies to Kind regarding her bankruptcy action. Accordingly, to the extent that the trial court could have deemed the substance of the letters as contradictory to the allegations in the complaint, the court was required to defer to the complaint.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Kind, as the prevailing party, may tax costs. MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher